

ORIGINAL

EX PARTE OR LATE FILED

January 25, 2002

**BY HAND**

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

RECEIVED

JAN 25 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: *Ex Parte* Submission in CC Docket No. 98-146, WT Docket No. 99-217, and CC  
Docket No. 96-98

Dear Ms. Salas:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, the companies and organizations listed in Attachment 1, hereto, who are working together in an industry working group on issues involving access to public rights-of-way and public lands (the "Industry Rights-of-Way Working Group"), jointly submit this *ex parte* submission in the above-captioned proceedings. We are making this joint *ex parte* submission in response to certain questions raised at a January 3, 2002 meeting with staff from the Common Carrier Bureau, Wireless Telecommunications Bureau, and Cable Services Bureau to discuss barriers to deployment associated with access to public rights-of-way and public lands (*See Notice of ex parte* presentation in captioned dockets, filed January 7, 2002).

*Unlawful Barriers to Entry.* In response to staff's request that we provide a specific inventory of the types of activities that constitute barriers to entry, we are attaching a list of examples entitled "Unlawful Barriers to Market Entry Commonly Imposed by Municipalities." See Attachment 2. This list inventories actions that telecommunications providers commonly encounter when trying to obtain access to public rights-of-way. Additionally, as shown by the footnotes on the document, every item on the list (either individually or as part of a whole) has been expressly found by a federal court to be in violation of Section 253. In most cases, several courts have come to this determination. Thus, this list demonstrates that providers face the same barriers time and again, and municipalities pay little heed to federal court determinations that such requirements are illegal. In many cases, these barriers also violate state law.

*List of Rights-of-Way Cases.* In response to staff's request, we have also compiled and attached a list of the pending and decided cases regarding rights-of-way access of which we are aware. See Attachment 3. In summary, in the last 5 years there have been more than 35 legal challenges involving more than 15 different carriers, and more than 30 different governmental entities. These numbers do not reflect appeals, other forms of multiple litigation between the same parties, or challenges brought strictly under state laws. The variety of this litigation demonstrates that barriers to access to rights-of-way is a nationally pervasive problem that impacts all sectors of the telecommunications industry.

Ms. Magalie Roman Salas

January 25, 2002

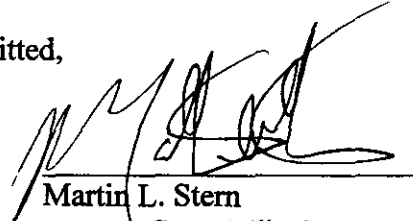
Page 2

Thank you for your attention to this matter. Please direct any questions regarding this *ex parte* submission to one of the undersigned.

Respectfully submitted,

/ms

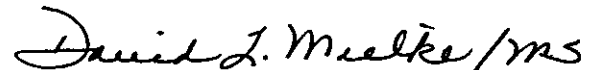
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*On behalf of the Industry Rights-of-Way Working Group*

**Attachments**

cc: CCB: Dorothy Attwood, Jeffrey Carlisle, Ellen Blackler, Eric Einhorn, Katherine Tofigh  
WTB: Thomas J. Sugrue, James D. Schlichting, David Furth, Jeffrey Steinberg, Leon  
Jackler  
CSB: W. Kenneth Ferree, William H. Johnson, Barbara Esbin

**Industry Rights-of-Way Working Group**

<b><u>Company/Organization</u></b>	<b><u>Representative Name/Title</u></b>
Adelphia Business Solutions	T. Scott Thompson, Cole, Raywid & Braverman (outside counsel)
ALTS	Tiki Gaugler, Assistant General Counsel
AT&T	Frank S. Simone, Government Affairs Director
BellSouth	Dorian Denburg, Chief Rights-of-Way Counsel
City Signal Communications	Jeffrey Karp, Chuck Rohe, Swidler Berlin (outside counsel)
CompTel	Terry Monroe, VP, Industry & Government Relations
Global Crossing Ltd.	Paul Kouroupas, Sr. Counsel, World Wide Regulatory Martin L. Stern, Preston Gates (outside counsel)
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Verizon	David L. Mielke, National Municipal Affairs Manager
Williams Communications	Rick Wolfe, Director, Regulatory Affairs
WorldCom	Kevin P. Gallagher, Senior Counsel

## **Unlawful Barriers to Market Entry Commonly Imposed by Municipalities**

- Fees that are not identified.<sup>1</sup>
- Fees that are not based on the municipality's costs or that allow the municipality to recover more than its costs.<sup>2</sup>
- Lengthy and detailed application forms that require disclosure of matters such as:
  - corporate policies and business plans,
  - documentation of licenses,
  - financial, technical and legal qualifications,
  - a description of all current or future services,
  - open-ended additional requests for information as desired by the locality.<sup>3</sup>
- Ordinance provisions that provide no guidance to a provider about how to apply for a franchise or what the application should be.<sup>4</sup>
- Annual registration fees.<sup>5</sup>
- Granting a single provider the exclusive right to construct telecommunications facilities.<sup>6</sup>

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<sup>1</sup> 47 U.S.C. Sec. 253(c) requires compensation to be "publicly disclosed." See *Peco Energy Co. v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409 at \*23.

<sup>2</sup> The following courts have struck down fees that are not cost-based: *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1176 (9<sup>th</sup> Cir. 2001), *cert. denied* 2002 U.S. LEXIS 232 (Jan. 7, 2002); *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 2001 U.S. Dist. LEXIS 2478 (D. N.J. Mar. 7, 2001); *Qwest Communications Corp. v. City of Berkeley*, Order Granting Preliminary Injunction, No. C 01-0663 SI (N.D. Cal., May 23, 2001) (rejecting a flat fee of \$2,000 per project); *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 808-11 and 814 (D. Md. 1999) (fee based on a percentage of gross revenues was not related to the County's costs), *vacated on other grounds*, 212 F.3d 863 (4<sup>th</sup> Cir. 2000), *remanded* to 155 F. Supp.2d 465 (D. Md. 2001); *Haverford*, 1999 U.S. Dist. LEXIS 19409 \*23 (E.D. Pa. Dec. 20, 1999) ("Any fee...must be directly related to the company's use of the right-of-way.")

<sup>3</sup> *Auburn*, 260 F.3d at 1178; *TCG New York v. City of White Plains*, 125 F. Supp. 2d 81, 91 (S.D.N.Y. 2000) (prohibiting requests for information concerning the financing of operations and construction), *appeal docketed* (2d Cir. No. 017213); *Berkeley*, No. C 01-0663 SI (N.D. Cal., May 23, 2001); *AT&T Communications of Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 587-88, 593 (N.D. Tex. 1998), *vacated as moot*, 2001 U.S. App. LEXIS 3890 (5<sup>th</sup> Cir. Mar. 15, 2001); *Prince George's County*, 49 F. Supp. 2d at 808-11, 814.

<sup>4</sup> *Peco Energy Co.*, 1999 U.S. Dist. LEXIS 19409 at \*23.

<sup>5</sup> *Berkeley*, No. C 01-0663 SI (N.D. Cal., May 23, 2001).

<sup>6</sup> *State of Minnesota*, Memorandum Opinion and Order, FCC 99-402 (Rel. Dec. 23, 1999) (regarding state freeway rights-of-way); *Classic Telephone, Inc. Petition for Preemption of Local Entry Barriers*, 11 F.C.C.R. 13082 (1996).

- Basing right-of-way access on legal, technical and financial qualifications to operate.<sup>7</sup>
- Advanced notification before the introduction of any new service in the City.<sup>8</sup>
- Prohibitions on resale to anyone who does not have a franchise.<sup>9</sup>
- A public hearing on the application.<sup>10</sup>
- Discretionary factors irrelevant to management or use of the right-of-way, including open-ended public interest considerations.<sup>11</sup>
- Regulations governing the transferability of ownership, and even stock sales.<sup>12</sup>
- Detailed ownership and control information, including information regarding other systems' holdings.<sup>13</sup>
- Municipal reservation of discretion to grant, deny or revoke franchises.<sup>14</sup>
- Overreaching reporting and inspection requirements regarding matters not directly related to management of the rights-of-way.<sup>15</sup>
- "Most favored community" status regarding rates, terms and conditions of service.<sup>16</sup>

<sup>7</sup> *Dallas*, 8 F. Supp. 2d at 587, 593.

<sup>8</sup> *Id.* at 587, 593; *Board of County Commissioners of Grant County, New Mexico v. US West Communications*, No. CIV 98-1354 JC/LCS (D.N.M. June 26, 2000).

<sup>9</sup> *Dallas*, 8 F. Supp. 2d at 587-88, 593.

<sup>10</sup> *Auburn*, 260 F.3d at 1176-79; *Berkeley*, No. C 01-0663 SI (N.D. Cal., May 23, 2001).

<sup>11</sup> *Auburn*, 260 F.3d at 1179; *White Plains*, 125 F. Supp. 2d at 92-93 (striking down the City's discretion to approve the franchise only if the City found the franchise was in the public interest); *Berkeley*, No. C 01-0663 SI (N.D. Cal., May 23, 2001) (prohibiting the consideration of "such other factors" and information as the City wished).

<sup>12</sup> *Auburn*, 260 F.3d at 1178; *Prince George's County*, 49 F. Supp. 2d at 808-11, 814.

<sup>13</sup> *Auburn*, 260 F.3d at 1178; *Dallas*, 8 F. Supp. 2d at 587, 593.

<sup>14</sup> *Auburn*, 260 F.3d at 1176 (described by the court as the "the ultimate cudgel"); *New Jersey Payphone Ass'n.*, 2001 U.S. Dist. LEXIS 2478 at \*27 (prohibiting unfettered discretion of the town to change the rules granting access to the rights-of-way); *Dallas*, 8 F. Supp. 2d at 592; *Board of County Commissioners of Grant County*, No. CIV 98-1354 JC/LCS; *Prince George's County*, 49 F. Supp. 2d at 808-11, 814; *BellSouth Telecommunications, Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304, 1310 (S.D. Fla. 1999), *aff'd in part, rev'd in part sub nom., BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 2001 U.S. App. LEXIS 10837 (11<sup>th</sup> Cir. May 25, 2001); *Peco Energy Co.*, 1999 U.S. Dist. LEXIS 19409 at \*20.

<sup>15</sup> *Auburn*, 260 F.3d at 1178; *White Plains*, 125 F. Supp. 2d at 94; *Berkeley*, No. C 01-0663 SI (N.D. Cal., May 23, 2001) (prohibiting a requirement that the company report any person who has leased capacity on the company's network, and other general reporting requirements); *Dallas*, 8 F. Supp. 2d at 588 (requesting detailed audits of AT&T's financial and other records and notice to the City of all communications with the FCC, SEC and PUC regarding service in Dallas); *Coral Springs*, 42 F. Supp. 2d at 1308-09 (striking down requirements for information regarding system, plans or purposes of telecommunications facilities); *Prince George's County*, 49 F. Supp. 2d at 808-11, 814; *Board of County Commissioners of Grant County*, No. CIV 98-1354 JC/LCS (D.N.M. June 26, 2000).

- Requirements to provide the locality with free fiber and conduit capacity.<sup>17</sup>
- Undue delay in granting or denying franchises and the resulting irreparable harm from such delay.<sup>18</sup>
- Provisions requiring waiver of the right to challenge the franchise and/or the ordinance.<sup>19</sup>
- Provisions requiring municipal approval of construction on private property.<sup>20</sup>
- Assessments of the aesthetic impact of the proposed system.<sup>21</sup>
- Information requests regarding all convictions or findings by a government authority that the company had violated any law or ordinance, or license or franchise agreement.<sup>22</sup>
- Universal service requirements.<sup>23</sup>
- Build-out requirements.<sup>24</sup>

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<sup>16</sup> *Auburn*, 260 F.3d at 1178-79; *White Plains*, 125 F. Supp. 2d at 94; *TCI Cablevision*, 12 F.C.C.R. 21396, 21441 (1997).

<sup>17</sup> *Auburn*, 260 F.3d at 1179; *Dallas*, 8 F. Supp. 2d at 593.

<sup>18</sup> *White Plains*, 125 F. Supp. 2d at 89; *Berkeley*, No. C 01-0663 SI (N.D. Cal., May 23, 2001) (discussing the irreparable harm to goodwill if permits are not issued to service new customers); *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928, 938 (W.D. Tex. 1997), vacated on other grounds, 235 F.3d 241 (5<sup>th</sup> Cir. 2000); *Classic Tel. Co. Pet for Emergency Relief*, 12 F.C.C.R. 15619, 15634 (1997).

<sup>19</sup> *White Plains*, 125 F. Supp. 2d at 94.

<sup>20</sup> *Id.*

<sup>21</sup> *Berkeley*, No. C 01-0663 SI (N.D. Cal., May 23, 2001).

<sup>22</sup> *Id.*

<sup>23</sup> *Dallas*, 8 F. Supp. 2d at 593.

- Regulations regarding a provider's service offerings.<sup>25</sup>
- Buy-back provisions that provide, upon termination or expiration of the franchise, title to the facilities and related equipment will transfer to the municipality, at no cost to the municipality.<sup>26</sup>
- Equal employment opportunity provisions.<sup>27</sup>

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<sup>24</sup> *Id.* at 588, 593.

<sup>25</sup> See *Auburn*, 260 F.3d at 1178; *Prince George's County*, 49 F. Supp. 2d at 817; *Coral Springs*, 42 F. Supp. 2d at 1310; *Dallas*, 8 F. Supp. 2d at 593; *Haverford*, 1999 U.S. Dist. LEXIS 19409 at \*20-23.

<sup>26</sup> *Coral Springs*, 42 F. Supp. 2d at 1311.

<sup>27</sup> *Austin*, 975 F. Supp. at 938.

**Litigation Regarding Rights-of-Way Access**

**FEDERAL COURT CASES:**

*AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928 (W.D. Tex. 1997), *vacated on other grounds*, 235 F.3d 241 (5<sup>th</sup> Cir. 2000).

*AT&T Communications of the Southwest, Inc. v. City of Austin*, 42 F. Supp. 2d 708 (W.D. Tex. 1998).

***AT&T v. Dallas Cases:***

- *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582 (N.D. Tex. 1998), *vacated as moot*, 2001 U.S. App. LEXIS 3890 (5<sup>th</sup> Cir. Mar. 15, 2001).
- 52 F. Supp. 2d 756 (N.D. Tex. 1999).
- 52 F. Supp. 2d 763 (N.D. Tex. 1999).

*Auburn v. Qwest Corp.*, 260 F.3d 1160 (9<sup>th</sup> Cir. 2001), *cert. denied*, 2002 U.S. LEXIS 232 (Jan. 7, 2002).

*Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805 (D. Md. 1999), *vacated on other grounds*, 212 F.3d 863 (4<sup>th</sup> Cir. 2000), *remanded* to 155 F. Supp.2d 465 (D. Md. 2001).

*BellSouth Telecommunications, Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304 (S.D. Fla. 1999), *aff'd in part, rev'd in part sub nom.*, *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11<sup>th</sup> Cir. 2001).

*BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 1999 U.S. Dist. LEXIS 16904 (S.D. Fla. Sept. 28, 1999), *aff'd in part, rev'd in part*, 252 F.3d 1169 (11<sup>th</sup> Cir. 2001).

*Board of County Commissioners of Grant County, New Mexico v. Qwest Communications*, No. CIV 98-1354 JC/LCS (D.N.M. Aug. 3, 2001).

*Cablevision of Boston, Inc. v. Public Improvement Comm'n of the City of Boston*, 184 F.3d 88 (1<sup>st</sup> Cir. 1999).



*City of Chattanooga v. BellSouth Telecommunications, Inc. MCI, ACSI and TCG*, 1997 U.S. Dist. LEXIS 17458 (E.D. Tenn. Oct. 24, 1997); *vacated and remanded to state court, City of Chattanooga v. BellSouth Telecommunications, Inc., et al.*, 1 F. Supp. 2d 809 (E.D. Tenn. 1998); *City of Chattanooga v. BellSouth Telecommunications, Inc., et al.*, No. 96-CV-1155 (Circuit Ct., Hamilton County, Tenn., Jan. 4, 1999); *affirmed, City of Chattanooga v. BellSouth Telecommunications, Inc.*, 2000 Tenn. App. LEXIS 32 (Tenn. Ct. App. 2000).

*GST Tucson Lightwave, Inc. v. City of Tucson*, 950 F. Supp. 968 (D. Ariz. 1996). The U.S. Court of Appeals for the Ninth Circuit dismissed a subsequent appeal by GST and remanded the case, because the parties had settled the case in the interim. See *GST Tucson Lightwave, Inc. v. City of Tucson*, 1998 U.S. App. LEXIS 1498 (9<sup>th</sup> Cir. 1998).

*Lexington-Fayette Urban County Government, KY v. BellSouth Telecommunications, Inc.*, Case No. 00-5408 (6<sup>th</sup> Cir. July 26, 2001).

*New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 2001 U.S. Dist. LEXIS 2478 (D.N.J. Mar. 7, 2001).

*Omnipoint Communications, Inc. v. The Port Authority of New York and New Jersey*, 1999 U.S. Dist. LEXIS 10534, at \*6 (S.D.N.Y. 1999),

*PECO Energy Co. v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409 (E.D. Pa. Dec. 20, 1999).

*TCG New York v. City of White Plains*, 125 F. Supp. 2d 81 (S.D.N.Y. 2000), *appeal docketed* (2d Cir. No. 017213).

#### **TCG v. Dearborn Cases:**

- *TCG Detroit v. City of Dearborn*, 977 F. Supp. 836 (E.D. Mich. 1997).
- *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d 785 (E.D. Mich. 1998).
- *TCG Detroit v. City of Dearborn*, No. 98-803937-CK (Circuit Court, Hamilton County, June 17, 1999).
- *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6<sup>th</sup> Cir. 2000), *reh'g denied*, 2000 U.S. App. LEXIS 8826 (May 1, 2000).

#### **STATE COURT CASES:**

*AT&T Communications of the Pacific Northwest, Inc. v. City of Eugene*, 177 Or. App. 379 (2001).

*City and County of Denver v. Qwest Corp.*, 18 P.3d 748 (2001).

*City Signal Communications Inc. v. City of South Euclid*, Case No. 423799, (Ct. Comm. Pleas, Cuyahoga County, Oh. Oct. 23, 2001).

*Lightwave Technologies, LLC v. Escambia County, AL*, 2001 WL 306921 (AL 2001)

#### **FEDERAL COMMUNICATIONS COMMISSION CASES:**

*In re City Signal Communications, Inc.*, Petition for Declaratory Ruling Concerning Use of Public Rights-of-Way in Wickliffe, Ohio, FCC CS Docket No. 00-254.

*Classic Telephone, Inc.*, Petition for Preemption of Local Entry Barriers, 11 FCC Rcd. 13082 (1996).

*State of Minnesota*, Memorandum Opinion And Order, FCC 99-402 (rel. Dec. 23, 1999).

*TCI Cablevision of Oakland County*, 12 FCC Rcd. 21396 (1997).

#### **STATE COMMISSION CASES:**

*Metromedia Fiber Network Services v. City of Carrollton, TX*, Order on Certified Issue, Docket No. 24480, Texas Pub. Util. Comm'n (Sept. 28, 2001)

*Opinion and Order, Metromedia Fiber Network Services, Inc. v. City of Dearborn, MI*, Case No. U-12797, Michigan Pub. Serv. Comm'n (Aug. 16, 2001).

#### **PENDING CASES:**

*BellSouth Telecommunications, Inc. v. Memphis, TN*, No.CH-01-1357-3, (Chancery Ct. TN).

*Brooks Fiber Communications of Utah Inc. v. City of North Ogden*, No. 1:01CV0125C (D. Utah).

*Broward County, FL v. BellSouth Telecommunications, Inc.*, appeal docketed No. 00-3262 (Fla. 4<sup>th</sup> DCA, Sept. 12, 2000).

*In re City Signal Communications, Inc.*, Petition for Declaratory Ruling Concerning Use of Public Rights-of-Way in Cleveland Heights, Ohio, FCC CS Docket No. 00-253.

*In re City Signal Communications, Inc.*, Petition for Declaratory Ruling Concerning Use of Public Rights-of-Way in Pepper Pike, Ohio, FCC CS Docket No. 00-255.

*MCIMetro Access Transmission Services, LLC v. City of Hawthorne*, No. CV 00-11165 CBM (C.D. Cal.).

*Metromedia Fiber Network Services, Inc. v. City of Berkeley*, No. C 01-00722 SI (N.D. Cal.).

*Metropolitan Fiber Systems of California, Inc. v. Contra Costa County*, No. N02-0013 (Sup. Ct., Contra Costa County, CA).

*Pacific Bell Tel. Co. v. City of Hawthorne*, No. CV 01-01862 CBM (C.D. Cal.).

*Palm Beach County, FL v. BellSouth Telecommunications, Inc.*, appeal docketed No. 4DO1-1574 (Fla. 4<sup>th</sup> DCA, April 24, 2001).

*Qwest Communications Corp. v. City of Berkeley*, No. C 01-0663 SI (N.D. Cal.).

*TC Systems, Inc., et al. v. Town of Colonie*, 00-CV-1972 (N.D.N.Y.).

*Verizon Maryland Inc. v. Prince George's County*, CAE 02-00222 (Cir. Ct., Prince George's County, Md., filed Jan. 4, 2002).

*Verizon New York, Inc. v. City of Albany*, Index 7880-00 (N.Y. Sup. Ct., Albany County, filed Dec. 28, 2000).

*Williams Communications v. City of Riverside*, No. RIC 354749 (Sup. Ct. Riverside County, CA).